

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:MAN:2:TL-N-6030-00

VATaverna

date:

to: Area Manager/Director, Manhattan
Attention, Mitch Halper (Territory 4-4)

from: Area Counsel (Financial Services & Healthcare) (Area 1 - Manhattan, NY)

subject:

Form SS-10 (Taxable Year [REDACTED])
Consents to Extend the Statute of Limitations on Assessment

UIL Nos. 6501.04-00
6501.08-00
6501.08-17

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Introduction

This memorandum supersedes our previous memorandum dated September 27, 2000, based upon a review from Chief Counsel's National Office. The conclusions reached in our previous memorandum, however, have not changed. Additionally, this memorandum supercedes and replaces our previous memorandum dated

September 27, 2000, based upon the revenue agent's discovery of a further merger that affects the language of future Forms SS-10.

We write in response to your request for advice in the above-captioned matter. Specifically you have requested that we provide you with advice concerning the validity of the Form SS-10 (Consent to Extend the Time to Assess Employment Taxes) executed by [REDACTED], as successor in interest to [REDACTED] for the [REDACTED] taxable year.

You have also indicated that, in the future, it may be necessary to obtain a Form SS-10 for taxable years subsequent to [REDACTED]. Therefore, we have also addressed the appropriate language to use on future Forms SS-10.

The advice given below is subject to post review by the Chief Counsel's national office. Therefore, we ask that you wait ten working days from the date of this memorandum, or until you earlier hear of approval, before acting on this advice.

Facts

You are examining [REDACTED]'s employment tax liabilities for the [REDACTED] and [REDACTED] taxable years. [REDACTED] merged into [REDACTED] subsequent to [REDACTED], but prior to [REDACTED]. On [REDACTED], pursuant to prior advice, [REDACTED], as successor in interest to [REDACTED], executed a Form SS-10 extending the time to assess employment taxes against [REDACTED] for the [REDACTED] taxable year.

Subsequent to the execution of the Form SS-10, it was discovered that in [REDACTED] (EIN [REDACTED]) claimed to be the "common paymaster" for [REDACTED] and filed Forms 941 allegedly reporting [REDACTED]'s employment tax liabilities.¹ The Forms 941 reflect [REDACTED]'s name and EIN number, but do not reflect [REDACTED]'s name and EIN

¹The common paymaster provisions apply only with respect to employees who are concurrently employed by two or more related corporations. It is unlikely that all employees of [REDACTED] were concurrently employed by [REDACTED]. We suspect that there were some employees employed only by [REDACTED], and that [REDACTED] was responsible for disbursing wages to those individuals. If this is the case, [REDACTED] would merely be a payroll agent for [REDACTED], and would not qualify as the common paymaster with respect to individuals who were not concurrently employed.

number. The Forms 941 do not report [REDACTED]'s employment tax liabilities separate from [REDACTED]'s liabilities.

In [REDACTED], [REDACTED] changed its name to [REDACTED] (EIN [REDACTED]).² In [REDACTED], [REDACTED], a Delaware corporation, merged into [REDACTED] (EIN [REDACTED]), a New York corporation. [REDACTED] survived the merger and the name of the surviving corporation was [REDACTED] (EIN [REDACTED]).

Issues

1. Whether [REDACTED], the common paymaster for [REDACTED], may file Forms 941 reflecting its name and taxpayer identification number, but report [REDACTED]'s employment tax liabilities.

2. Whether the Form SS-10 executed by [REDACTED] as successor in interest to [REDACTED] extending the time to assess employment taxes for the [REDACTED] taxable year is valid.

3. What specific language should be used on future Forms SS-10?

Discussion

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the extension, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed extension to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed extension is received from the taxpayer, the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event an extension becomes separated

²We have not been provided with verification of [REDACTED]'s name change to [REDACTED]. However, for purposes of providing the proper language to use on future Forms SS-10, we have included sample language to be used if the name change occurred and additional language in the case the name change did not occur.

from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form SS-10. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement.

Regardless of which method you use to notify the taxpayer, you should document your actions in this regard in the case file. Although section 6501(c)(4)(B) does not provide a sanction or penalty on the Service for failure to comply with the notification requirement, a court might conclude that an extension of the statute of limitations is invalid if the Service did not properly notify the taxpayer. Thus, it is important to document your actions in this regard in the case file.

1. Whether [REDACTED], the common paymaster for [REDACTED], may file Forms 941 reflecting its name and taxpayer identification number, but report [REDACTED]'s FICA liabilities.

I.R.C. § 3121 and the regulations thereunder, define a common paymaster. A common paymaster is responsible to 1. compensate an employee where two or more related corporations concurrently employ the same individual; 2. remit taxes pursuant to I.R.C. §§ 3102 and 3111 with respect to the remuneration it disburses as the common paymaster; and 3. file information and tax returns and issue Forms W-2 with respect to wages it is considered to have paid under this section. Treas. Reg. § 31.3121(s)-1(a). The common paymaster computes these taxes as though it were the sole employer of the concurrently employed individuals. If the common paymaster fails to remit these taxes (in whole or in part), it remains liable for the full amount of the unpaid portion of these taxes. In addition, each of the other related corporations using the common paymaster is jointly and severally liable for its appropriate share of these taxes. Treas. Reg. § 31.3121(s)-1(c)(1).

According to the information you have provided us, it is our understanding that you have not yet determined whether, pursuant to I.R.C. § 3121 and the regulations thereunder, [REDACTED] qualifies as the common paymaster for [REDACTED] for the

██████ and ██████ taxable years. If you determine that ██████ did not qualify as a common paymaster, ██████ was not authorized to file a Form 941 reporting ██████'s employment tax liabilities. Accordingly, no return was filed. In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). If no return is filed, the tax may be assessed at any time.

There is no caselaw or statutory authority addressing the filing of Forms 941 by a common paymaster in the manner that ██████ filed the Forms 941. Likewise, there is no published guidance. However, it is our understanding that Forms 941 are commonly filed in this manner, and have a long history of being so filed. Accordingly, we advise that the Forms 941 be treated as valid returns of ██████ for purposes of addressing the statute of limitations. Since a return was filed, I.R.C. § 6501(a) applies.

Section 6501(c)(4), however, provides an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment. For employment taxes, the form used by the Service to extend the limitations period on assessment is Form SS-10 (Consent to Extend the Time to Assess Employment Taxes).

2. Whether the Form SS-10 executed by ██████ as successor in interest to ██████ extending the time to assess employment taxes for the ██████ taxable year is valid.

The Form SS-10 executed by ██████ as successor in interest to ██████ extending the time to assess employment taxes for the ██████ taxable year is valid. Since each related corporation using the common paymaster is jointly and severally liable for its appropriate share of employment taxes if the common paymaster fails to remit these taxes (in whole or in part), each corporation may, therefore, enter into its own consent to extend the statute of limitations with respect to its employment tax liabilities.

Additionally, the related corporation may enter into its own Form SS-10 based upon the agency relationship it shares with the common paymaster. The common paymaster is the related corporation's agent for the payment of employment taxes and the filing of returns. The principal is still permitted to act on its own behalf. In this case, ██████ acted as ██████'s agent. Therefore, ██████, as the

principal, may enter into its own consent to extend the statute of limitations. Accordingly, the Form SS-10 executed by [REDACTED], as successor in interest to [REDACTED] is valid.

The Forms SS-10 should be executed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act on behalf of the corporation. See Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

3. What specific language should be used on future Forms SS-10?

In the case of merged corporations, the surviving or resulting corporation in a merger under state law may validly sign an extension agreement on behalf of the transferor (predecessor) corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 488; See also Popular Library Inc. v. Commissioner, 39 T.C. 1092 (1963); Union Bleachery v. Commissioner, 97 F.2d 226 (4th Cir. 1938).

In the subject case, [REDACTED] is a Delaware corporation, and [REDACTED] is a New York corporation. These two corporations merged in accordance with the corporation laws of New York and Delaware. Pursuant to the law of New York, once a merger is effected, "[t]he surviving or consolidated corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent entities." N.Y. Bus. Corp. L. § 906(b)(3) (Consol. 1999). Similarly, pursuant to the law of Delaware, "when any merger or consolidation shall have become effective ... all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it." Del. Code Ann., Title VIII, § 259(a) (1998).

Although we believe the Form SS-10 in issue is valid, we advise that in executing future Forms SS-10 both [REDACTED] and [REDACTED] (EIN [REDACTED]) execute Forms SS-10.

The captions of the Form SS-10 for [REDACTED] and [REDACTED] should read as follows:

[REDACTED]
" [REDACTED] (EIN #) as

successor in interest to [REDACTED]
(EIN #)."

The EIN of [REDACTED] should be entered in
the upper right hand corner of the Form SS-10.

[REDACTED] (use if name change
occurred)

" [REDACTED] (EIN [REDACTED])
[REDACTED], formerly [REDACTED]
([REDACTED]), as successor in interest to
[REDACTED] (EIN [REDACTED])
[REDACTED], formerly [REDACTED] (EIN [REDACTED])
[REDACTED], common paymaster for [REDACTED]
[REDACTED] (EIN #), as successor in
interest to [REDACTED] (EIN #)."

The EIN of [REDACTED] should be
entered in the upper right hand corner of the Form SS-10.

Should you have any questions regarding this matter, please
contact Viviana Taverna of this office at (212) 264-1595, ext. 211.

ROLAND BARRAL
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& Healthcare:Manhattan)

By: _____

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